INSIGHT

INSTRUMENTALIZATION OF MIGRANTS, SANCTIONS TACKLING HYBRID ATTACKS AND SCHENGEN REFORM IN THE SHADOWS OF THE PACT
edited by Daniela Vitiello *and* Stefano Montaldo

LANGUAGE REQUIREMENTS: INTEGRATION MEASURES OR LEGAL BARRIERS? INSIGHTS FROM *X V UDLÆNDINGENÆVNET*

CRISTINA MILANO*

ABSTRACT: In *X v Udlændingenævnet*, the Court of Justice dealt with a Danish provision requiring a Turkish worker, legally resident in Denmark, to successfully pass a language test as a necessary condition to provide his spouse with a residence permit for the purpose of family reunification. The Court claimed that said legislation constitutes a "new restriction" within the meaning of art. 13 of Decision No 1/80 of the EEC-Turkey Association Council. This *Insight* addresses the main features of the preliminary judgment in *X v Udlændingenævnet* and offers an appraisal on the leading issues related to integration conditionality. Moving on from the Court's judgement, this *Insight* focuses on whether national measures imposing pre-departure language requirements may be conceived as tools for controlling immigration rather than effective integration instruments.

KEYWORDS: language requirement – family reunification – migrants' integration – freedom of movement of workers – EEC-Turkey Association Agreement – standstill clause.

I. INTRODUCTION

On 22 December 2022, the Second Chamber of the Court of Justice of the EU delivered a thought-provoking preliminary ruling in the Case *X v Udlændingenævnet*.[1] The Court of Justice stated that a Danish provision,[2] which introduces new language requirements for family reunification on Turkish workers legally resident in Denmark, is unlawful. According to the Court, the legal measure under examination constitutes a "new restriction"

* Ph.D. Candidate in EU Law, University of Tuscia, cristina.milano@unitus.it.

[1] Case C-279/21 *X v Udlændingenævnet* ECLI:EU:C:2022:1019.

[2] See para. 9(12)(5) of the Danish Law on foreign nationals.

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within the meaning of Decision No 1/80 of the Association Council (hereinafter, "Decision No 1/80")[3] set up by the EEC-Turkey Association Agreement (also known as "Ankara Agreement").[4] In particular, art. 13 of the abovementioned decision sets forth a standstill clause, according to which the Member States and Turkey "may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories".[5]

As AG Pitruzzella highlighted in his opinion in the case in comment,[6] this is not the first time a Member State introduces specific language and civic tests for family reunification requested by third-country nationals (TCNs) who are already present and legally registered in their territories.[7] In *Dogan*,[8] for instance, the Court considered the standstill clause laid down in art. 41(1) of the 1970 Additional Protocol to the Ankara Agreement,[9] which prevents parties from introducing new restrictions on both the freedoms of establishment and to provide services.[10] According to the Court, in light of this clause, Member States shall not introduce subsequent legislation requiring spouses of Turkish nationals residing in a Member State – who want to enter that country's territory for purpose of family reunification – to demonstrate a basic knowledge of the official language of the country concerned. In fact, as far as these linguistic requirements may hamper the entry in the EU by spouses of Turkish nationals – compared to conditions applicable when the Additional Protocol entered into force – these national measures constitute a "new restriction" on the exercise of the freedom of establishment by Turkish nationals within the meaning of art. 41(1) of the Protocol.[11] While in *Dogan* the Court addressed the issue of language requirements imposed on family members seeking entry to EU territory to join Turkish workers already living there, the case under review dealt with the opposite situation, *i.e.*, language requirements imposed upon a Turkish national who had been legally residing and working in Denmark since

[3] Decision No 1/80 of the Association Council of 19 September 1980 on the Development of the Association between the European Economic Community, on one part, and the Republic of Turkey, on the other part.

[4] Association Agreement of 12 September 1963 on the development of the Association between the European Economic Community, on one part, and the Republic of Turkey, on the other part.

[5] It should be noted that, through a standstill clause, the parties aimed at keeping the market at least as open in the future as it was when the instrument (in this case, the EEC-Turkey Agreement) was concluded. See European Commission, DG TRADE, *Standstill clause* trade.ec.europa.eu.

[6] *X v Udlændingenævnet*, opinion of AG Pitruzzella, para. 1.

[7] *Ibid.*; A Böcker and T Strike, 'Language and Knowledge Tests for Permanent Residence Rights: Help or Hindrance for Integration?' (2011) European Journal of Migration and Law 157.

[8] Case C-138/13 *Dogan* EU:C:2014:2066.

[9] See Council Regulation (EEC) 2760/72 of 19 December 1972 concluding the additional protocol and the financial protocol signed on 23 November 1970 and annexed to the Agreement establishing an Association between the European Economic Community and Turkey and relating to the measures to be taken for their implementation.

[10] Differently from art. 13 of Decision 1/80, which does not refer to the exercise of these freedoms.

[11] *Dogan* cit. para. 36.

1985. Thus, the applicant held a permanent residence permit in the host EU State well ahead the authorisation of his family reunification request[12].

Before assessing the Court's decision in *X v Udlændingenævnet*, it is worth noting that within the EU "the Member States often perceive [integration measures] as 'managerial tools' for the selection of migrants deserving a chance".[13] Over recent decades, this situation has given rise to different forms of integration conditionality, both at national and EU level.[14] EU primary legislation – namely art. 79(4) TFEU – limits the role of the Union in TCN integration to support actions,[15] while EU secondary legislation (*e.g.*, Directive 2003/86/EC on family reunification[16] and Directive 2003/109/EC on long-term residents[17]) lays down provisions allowing for integration measures and conditions.[18] Therefore, the Member States have often used the room for manoeuvre left by EU law to impose integration requirements within their domestic legal framework,[19] to introduce mandatory integration programmes for TCNs. While a significant number of Member States established post-arrival mandatory integration measures or conditions which TCNs must comply with in order to legally reside in their territories, some other Member States opted for imposing pre-departure/pre-entry integration requirements.[20] At any rate, States' discretion is not absolute, as it must comply with the principle of proportionality: these national integration measures shall not go beyond what is strictly necessary and shall be adequate to pursue the objective of facilitating the TCNs' integration process in the EU. This is particularly evident in case of mandatory pre-departure requirements: although pre-entry exams are in principle compatible with EU law,[21] an even more rigorous proportionality

[12] *X v Udlændingenævnet,* opinion of AG Pitruzzella, cit. para. 1.

[13] See S Montaldo, 'Regular Migrants' Integration between European Law and National Legal Orders: A Key Condition for Individual and Social Development' in GC Bruno, FM Palombino and D Amoroso (eds), *Migration and Development: Some Reflections on current Legal Questions* (CNR Edizioni 2016) 51.

[14] *Ibid.*

[15] "The European Parliament and the Council [...] may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States."

[16] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification.

[17] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[18] See, for instance, art. 7(2) of the Directive on the right to family reunification.

[19] See K de Vries, 'Integration Requirements in EU Migration Law' (EUI Working Papers - 2012) 6.

[20] MC Locchi, 'Immigration Policies and the "Unbearable Lightness" of Integration: The Case of Pre-Entry Integration Requirements in Europe' in S Baldin and M Zago (eds), *Europe of Migrations: Policies, Legal Issues and Experiences* (EUT Edizioni Università di Trieste 2017) 130. On the interesting debate within scholar about the dividing line between the terms "integration measures" and "integration conditions", see, *ex multis*, K de Vries, 'Integration Requirements in EU Migration Law' cit. 7 ff.; S Montaldo, 'Regular Migrants' Integration between European Law and National Legal Orders' cit. 62 ff.; K Groenendijk, 'Legal Concepts of Integration in EU Migration Law' (2004) European Journal of Migration and Law 11.

[21] According to the EU Commission, integration can in fact start even before arrival in the Union. See Communication COM(2020) 758 final of 24 November 2020, Action plan on Integration and Inclusion 2021-2027.

test should be performed[22] in order to avoid unjustified impediments to migrants' integration. Since TCN integration is the ultimate goal of these measures, "their admissibility [...] depends on whether they serve this purpose and whether they respect the principle of proportionality [...]. Their admissibility can be questioned on the basis of the accessibility of such courses or tests, how they are designed and/or organised (test materials, fees, venue, etc.), whether such measures or their impact serve purposes other than integration".[23] Member States thus hold an obligation to put even more effort to render pre-departure examinations easily accessible in concrete terms and to convoy TCNs towards a successful integration path.[24]

On these premises, the *Insight* aims at providing a critical appraisal of the ruling delivered in the Case *X. v Udlændingenævnet*. The analysis addresses the relevant provisions of the Ankara Agreement and of Decision No 1/80 (section II). After a brief overview of the factual background (section III), the *Insight* situates the case in comment within the remit of the ECJ's burgeoning case law on the scope and purpose of national integration clauses (sections IV and V).

II. The EEC-Turkey Association Agreement: the role played by Decision 1/80 and its standstill clause

The EEC-Turkey Association Agreement – concluded in September 1963 in Ankara – can be deemed as a pivotal step in establishing a privileged relationship between the EU and the Republic of Turkey. On 23 November 1970, the parties concluded an Additional Protocol and a Financial Protocol, which are integral parts of the Agreement.

The EEC-Turkey Agreement itself does not contain explicit or direct references to the issue of TCN integration. Its main purpose – as set forth in art. 2(1) – "is to promote the continuous and balanced strengthening of trade and economic relations between the Parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people".[25] Arts 22 and 23 of the Ankara Agreement give the Association

[22] S Montaldo, 'Regular Migrants' Integration between European Law and National Legal Orders' cit. 66.

[23] Communication COM(2008) 610 final of 8 October 2008 on the application of Directive 2003/86/EC on the right to family reunification, p. 7.

[24] S Montaldo, 'Regular Migrants' Integration between European Law and National Legal Orders' cit. 67. In this sense, Case C-153/14 *K and A* ECLI:EU:C:2015:453; Cases C-331/16 and C-366/16 *K v Staatssecretaris van Veiligheid en Justitie and H. F. v Belgische Staat*, ECLI:EU:C:2018:296; Case C-257/17 *C and A* ECLI:EU:C:2018:876.

[25] Furthermore, the economic nature of the Association Agreement has been confirmed by the Court of Justice on various occasion, among which see case C-561/14 *Caner Genc v Integrationsministeriet* ECLI:EU:C:2016:247 para. 52; case C-221/11 *Leyla Ecem Demirkan v Bundesrepublik Deutschland* ECLI:EU:C:2013:583 para. 50; case C-371/08 *Nural Ziebell v Land Baden-Württemberg* ECLI:EU:C:2011:244 para. 64. S Ganty, 'Silence is not (Always) Golden: A Criticism of the ECJ's Approach towards Integration Conditions for Family Reunification' (2021) European Journal of Migration and Law 176.

Council – a body composed by representatives of the Republic of Turkey, the Member States, and the Commission – the task to take all necessary measures to achieve the agreed objectives.[26] To this purpose, the Association Council adopted Decision 1/80, which entered into force in July 1980.

Decision 1/80 shall not impair the Member States' competence to regulate the access of Turkish citizens into their territories as well as to assess the conditions under which they may take up their first employment";[27] in addition, it does not expressly grant Turkish nationals the right to remain in the EU territory after having been employed in a Member State. Nonetheless, the Court has recognised that Decision 1/80 promotes the free movement of Turkish workers, providing them with "progressively more extensive rights as their lawful employment in a Member State".[28] Within this remit, a key role is played by art. 13, which contains a standstill clause prohibiting new national measures that could restrain the exercise of freedom of movement by Turkish workers legally residing in Europe and by members of their families. Therefore, this provision does not permit the introduction of more restrictive conditions than those which were applicable to those workers and their family members at the time of the entry into force of Decision 1/80.[29]

Art. 13 can thus impact the protection of social rights and fundamental freedoms of EU and Turkish citizens significantly, especially when it comes to family reunification matters. On this point, in *Genc* the Court claimed the existence of a link between the exercise of economic freedoms and family reunification, "since the conditions for entry and residence of family members of [Turkish nationals] under family reunification were likely to affect [their] exercise of such freedoms."[30] More precisely, the ECJ seems to have adopted an approach conceiving family reunification as an instrument to enhance the achievement of those (traditionally) primary EU objectives – *i.e.*, integration and liberalisation of

[26] Following a broader interpretation of the abovementioned provisions, the Association Council may also play a key role in adopting social security measures for Turkish workers moving to the territory of the European Union and for their family members. C Polat, 'Effects of Ankara Agreement within the Community Legal Order' (2011) Calışma İlişkileri Dergisi:Journal of Labour Migration 151; See also, P Minderhoud, 'Social Security Rights under Decision No 3/80 of The EEC-Turkey Association Council: Developments in the EU and in The Netherlands' (2016) European Journal of Social Security 268.

[27] Case C-36/96 *Günaydin* ECLI:EU:C:1997:445 para. 22. In particular, art. 6(1) provides as follows: "Subject to Article 7 on free access to employment for members of his family, a Turkish worker duly registered as belonging to the labour force of a Member State: shall be entitled in that Member State, after one year's legal employment, to the renewal of his permit to work for the same employer, if a job is available".

[28] Case C-416/96 *El-Yassini* ECLI:EU:C:1999:107 para. 42; In this sense, see also C Polat, 'Effect of the Ankara Agreement within the Community Legal Order' cit. 159; S Peers, 'Case C-210/97, Haydar Akman v. Oberkreisdirektor des Rheinisch-Bergischen Kreises, Judgment of the Court of Justice (Sixth Chamber) of 19 November 1998, [1998] ECR I-7519' (1999) CMLRev 1027.

[29] *X v Udlændingenævnet* cit. para. 30.

[30] *Genc* cit para. 43. In this sense, N Tezcan/Idriz, 'Family Reunification under the Standstill Clauses of EU-Turkey Association Law: Genc' (2017) CMLRev 263.

the market.[31] Indeed, family reunification may contribute to the creation of socio-cultural stability that may facilitate migrants' integration, improve the quality of their lives, and therefore promote economic and social cohesion.[32]

III. Factual background and preliminary questions

The preliminary ruling in *X. v Udlændingenævnet* concerns the case of Y., a Turkish national who has resided in Denmark since 1979, working as a mechanical technician, service operative, shop manager and warehouse manager. Mr. Y. has held a permanent residence permit in that Member State since 1985. In 2015, X., his wife – a Turkish citizen as well – applied for family reunification to join him in Denmark.

The Danish Immigration Office (*Udlændingestyrelsen*) rejected the application, on the grounds that her husband could not demonstrate he had successfully completed a Danish language test. Such a requirement is laid down in para. 9(12)(5) of the Danish Law on foreign nationals, which applies to any foreign national. According to this provision, a residence permit may be issued only if the foreign resident in Denmark has passed a specific language test (*Prøve i Dansk 1*) or, alternatively, another Danish test at an equivalent or higher lever.

The *Udlændingestyrelsen* stated that in the case under consideration there were no special reasons justifying a derogation from the above-mentioned legislation. Moreover, the Office added that its decision could not be affected by the application of the standstill clause laid down in art. 13 of Decision 1/80, as interpreted by the Court of Justice in *Dogan*. On appeal before the Ministry of Immigration and Integration against the decision of the Immigration Office, X. asked for her claim to be re-evaluated in light of the standstill clause. In the meantime, she received a residence permit for employment. After a new dismissal, the claimant decided to bring an action for annulment of the Ministerial decision before the District Court of Copenhagen, which referred the case back to the High Court of Eastern Denmark (the referring Court). Hence, the High Court clarified that the requirement to pass the *Prøve i Dansk 1* was introduced only in 2012 by an amendment to the Danish Law on foreign nationals.[33] Specifically, this *new legal measure* requires TCNs – who already hold a permanent residence permit in Denmark – to fulfil a language test as a mandatory pre-requisite for requesting family reunification. The referring judge also pointed out that, when Decision 1/80 came into force, there was no rule requesting

[31] C Ragni, 'Ricongiungimento familiare, tutela dei diritti e interessi dello Stato nella giurisprudenza della Corte di giustizia: considerazioni a margine dei casi Genc e Khachab' (2016) Osservatorio AIC 331.

[32] Several studies also demonstrate that family unity may have an extremely positive effect on the development of migrant worker ' networks in host country Member States. See OECD, 'Family ties: How family reunification can impact migrant integration' (International Migration Outlook - 2019) 177.

[33] Danish Law No. 572 of 18 June 2012 amending the Law on foreign nationals.

Turkish workers – who were already residing in the country – to pass a Danish language exam to allow their partners to join them.[34]

Thus, the referring court raised before the ECJ the following preliminary question: whether the condition laid down in para. 9(12)(5) of the Danish Law on foreign nationals might constitute a "new restriction" in the sense of the standstill clause *ex* art.13 of Decision No 1/80; and, in light of a positive reply, whether such a restriction may be justified by the objective of ensuring the successful integration of the Turkish worker's spouse, which itself might constitute an "overriding reason in the public interest", in line with the Court's jurisprudence on the subject matter.[35] In this regard, whereas standstill clauses in EU law are generally absolute, within the context of the EEC-Turkey Association Agreement, the Court acknowledged the possibility for Member States to derogate from them on public policy, public security, and public health grounds,[36] or on the basis of "an overriding reason in the public interest."[37] However it should be noted that these derogations remain lawful provided that they respect the principle of proportionality*, i.e.,* they are suitable to achieve the legitimate objective pursued and do not go beyond what is necessary in order to attain it.

IV. The Court's ruling: Danish legislation constitutes a new and unjustified restriction

The ECJ ruled that national legislation such as that at stake in the main proceedings constitutes a "new restriction" within the meaning of the stand still clause contained in art. 13 of Decision No 1/80.

Firstly, the Court pointed out that the standstill clause prohibits the introduction of national measures that are more restrictive than those applying to Turkish workers at the moment of the entry into force of Decision No 1/80 in the territory of the Member State concerned. In the case at stake, it held that the "controversial" Danish legislation – introduced after the entry into force of Decision No 1/80 in Denmark – may lead to a limitation

[34] *X v Udlændingenævnet,* opinion of AG Pitruzzella, cit. para. 7.

[35] Although the referring court raised three other preliminary questions, the ECJ considered that, in view of the answer provided to the first one, there was no need to address the remaining issues. As these last two were left unanswered by the Court, the Author does not consider them to be strictly relevant to the present discussion.

[36] In this regard, art. 14 of Decision 1/80 provides as follows: "The provisions of this section shall be applied subject to limitations justified on grounds of public policy, public security or public health. They shall not prejudice the rights and obligations arising from national legislation or bilateral agreements between Turkey and the Member States of the Community where such legislation or agreements provide for more favourable treatment for their nationals". The legitimacy of limitations on the right of foreign workers to enter and remain for these specific reasons finds its legal basis in art. 45(3) TFEU.

[37] See, among others, Case C-225/12 *Demir* EU:C:2013:725 para. 40; *Genc* cit. para. 51. In this sense, C Murphy, 'The Operation of Legal 'Othering' and the National–Foreigner Dichotomy in the EU' in M Jesse (ed.), *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (Cambridge University Press 2020) 105 ff.

to free movement of Turkish workers. The Court therefore found that the requirement of having successfully taken the *Prøve i Dansk 1* test (or another Danish test at an equivalent or higher-level) may hinder family reunification with Turkish workers who were legally resident in Denmark, compared to the situation pre-dating the entry into force of Decision No 1/80.[38] According to ECJ settled case law, family reunification constitutes an essential path to integration for Turkish nationals who belong to the labour force of the Member States.[39] In line with this, in Case C-279/21 the Court highlighted that Turkish nationals' search for a job in a Member State could be undermined by domestic legal barriers to family reunification. Consequently, Turkish workers may be obliged to choose between their career goals and family life.[40]

Secondly, as in the case under review a justification on grounds of public policy, public security or public health has not been detected,[41] the ECJ considered whether Danish legislation may rely on "an overriding reason of public interest" and whether this complies with the proportionality principle. In this regard, the Court recognised that this national legislation seeks to foster integration of family members applying for a family reunification permit in Denmark – an objective which, in principle, may constitute "an overriding reason in the public interest" under Decision No 1/80.[42] However, the Court stated that imposing a language test on Turkish workers, living and residing in Denmark, to obtain family reunification with their spouses, does not satisfy the proportionality test. Indeed, the linguistic clause was not intended to determine the integration potential of a TCN seeking entry into the EU territory for purposes of family reunification,[43] but merely to impose on already-settled TCNs a *dependence-based integration mechanism*, whose sole purpose seems difficult to discern.

The Court concluded that the national legislation at stake does not allow domestic authorities to consider other factors, such as Turkish workers' family members proficiency in Danish, "or the effective integration of the Turkish worker concerned which would enable him or her, notwithstanding his or her failure to pass the test in question, to contribute [...] to the integration of his or her family member in that Member State".[44]

[38] *X v Udlændingenævnet* cit. paras 31-33.
[39] *Dogan* cit. para. 34; *X v Udlændingenævnet,* opinion of AG Pitruzzella, cit. para. 19.
[40] *X v Udlændingenævnet,* opinion of AG Pitruzzella, cit., para. 32.
[41] *Ibid.* para. 36.
[42] *Ibid.* paras 37-38.
[43] *Ibid.* para. 42.
[44] *Ibid.* para. 44.

V. Beyond language "barriers": Paving the way to new integration strategies

The ruling in the case under consideration adds to previous family reunification cases,[45] which outline a trend in national practice to *certify* the suitability of TCN integration in the EU on the basis of successful completion of compulsory linguistic and/or civic integration tests.

The Danish Government justified its legislation by claiming that strict language requirements – as those laid down in the Danish Law on foreign nationals – should encourage foreign workers in Denmark to acquire a perfect command of the Danish language, as a means to place them and, consequently, their family members on a path towards successful integration in the host society.[46] Nonetheless, the fact that Turkish workers shall pass this language test is a *mandatory and indispensable requirement* to allow their spouses (or partners) to enter Denmark. Therefore, as was highlighted by AG Pitruzzella, this situation does not take into account in the slightest a spouse's *own* ability to integrate.[47] In other words, said national legislation establishes a non-rebuttable presumption that family members do not possess linguistic skills insofar as their spouses, legally working in the Member State concerned, do not fulfil certain language requirements.[48] This presumption may lead to an unjustified and unreasonable *dependence-based* model of integration of TCN's family members. By putting on TCNs the burden of demonstrating their intense desire as well as full capacity to integrate through the completion of a language test, before allowing their family members' arrival in the EU, this national legislation triggers the affirmation of an integration paradigm rooted in the concept of "deservingness"[49] of the fundamental rights which are granted to TCNs by EU law. Consequently, this *dependence-based* model results mostly in a twofold outcome: TCNs face uneven burdens in the attempt to join their partners, while the domestic authorities' migration control toolbox is strengthened.[50]

Furthermore, the Danish model under scrutiny fuels a self-feeding cycle, ultimately resulting in a *failure paradox.* By not passing an *indirect* pre-departure language test, Mr. Y. indirectly (and unwittingly) showcases that his impossibility to provide for his spouses' reunification (*reunification failure*) arises from Denmark's ultimate failure in integrating him after 36 years of permanent residence in the country (*integration failure).* Integration into a foreign society is, above all, a complex process, depending on various factors and circumstances, which cannot be reduced to the acquisition of language knowledge, especially

[45] Such as, for example, *Dogan, Genc* and Case C-379/20 *B v Udlændingenævnet* ECLI:EU:C:2021:660.

[46] *X v Udlændingenævnet,* opinion of AG Pitruzzella, cit. para. 32.

[47] *Ibid.*

[48] *Ibid.* paras 30-32.

[49] D Vitiello, 'In Search of the Legal Boundaries of an "Open Society". The Case of Immigrant Integration in the EU' (2022) Freedom, Security & Justice 159.

[50] On the issue of language requirements as a tool of immigration control, see S Wallace Goodman, 'Controlling Immigration through Language and Country Knowledge Requirements' (2011) West European Politics 235.

where the language requisite does not concern the persons seeking entry onto the EU territory but their spouses, who are already there.[51] As suggested by AG Pitruzzella, different solutions can be adopted to demonstrate that a TCN who is legally resident in a Member State is well integrated and thus able to support his/her partner along the path to integration. For instance, previous attendance of language courses may be considered.[52] In addition, domestic legislation may outline integration measures to foresee safety clauses[53] providing exceptions and/or alternatives to the completion of language tests. Indeed, for those who are unable to take or pass them, these language tests "could form a difficult obstacle to overcome in making the right to family reunification [...] exercisable".[54]

As a result, Member States may distort pre-entry conditions for family reunification to the point of making them "a ground for status deprivation, turning 'regular' into 'irregular' immigrants by leveraging on integration purposes"[55]. On this point, TCN's language test failure may be a reasonable ground for the denial of the residence permit for family reunification. While the burden of assessing immigrants' ability to "respect the fundamental norms and values of the host society and participate actively in the integration process" falls on Member States,[56] in this way the responsibility for integration is conversely shifted from States toward migrants.[57]

In addition, the analysis of the ruling delivered in Case *X v Udlændingenævnet* paves the way for a more general reflection on the use of integration measures and conditions at the Member States level. While in the Tampere Conclusion the European Council proclaimed that "a more vigorous integration policy should aim at granting [TCNs] rights and obligations comparable to those of EU citizens",[58] national legislations have created legal hurdles for full TCN integration in the Union. EU secondary legislation – including Directive 2003/86/EC on family reunification and Directive 2003/109/EC on long-term residents – mirrors this shift by putting forward compromise solutions which allow language *instrumentalisation* for migration management purposes,[59] *i.e.,* the knowledge of an EU official language used by Member States as a disguised instrument of migration control.

[51] *X v Udlændingenævnet* opinion of AG Pitruzzella, cit. para. 29.

[52] *Ibid.* para. 34.

[53] See M Jesse, 'Integration Measures, Integration Exams and Immigration Control: P and S and K and A' (2016) CMLRev 181.

[54] *K and A* cit. para. 59.

[55] D Vitiello, 'In Search of the Legal Boundaries of an "Open Society". The Case of Immigrant Integration in the EU' cit. 163. In this sense, see also M Jesse, *The Civic Citizens of Europe: The Legal Potential for Immigrant Integration in the EU, Belgium, and the United Kingdom* (Brill | Nijhoff 2017).

[56] Communication COM(2003) 336 final of 3 June 2003 on Immigration, Integration and employment, para. 3.1. See *Ibid.*

[57] A Böcker and T Strike, 'Language and Knowledge Tests for Permanent Residence Rights: Help or Hindrance for Integration?' cit. 159.

[58] Tampere European Council Presidency Conclusions of 15-16 October 1999.

[59] M Gnes, 'I requisiti linguistici e l'integrazione degli stranieri extracomunitari' (2016) *Giornale di diritto amministrativo* 221.

However, they also circumvent Member States' discretion, by imposing a rigorous respect of the principle of proportionality:[60] these national measures are legitimate as long as they are suitable and necessary to reach the integration objective.

Said objective is, therefore, a pivotal discriminant on what Member States can and cannot do with regard to language requirements. Case law is not lacking in decisions substantiating the above assertion. In *B v Udlændingenævnet*, for instance, the Court came to the opposite conclusion on the basis of the same reasoning. In particular, the ECJ had to ascertain whether para. 9(1)(2) of the Danish law on foreign nationals – which reduced from 18 to 15 years the age limit for family reunification of Turkish workers legally residing in Denmark with their kids – may constitute a "new restriction" within art. 13 of Decision 1/80. In the above case, in contrast to *X v Udlændingenævnet*, the ECJ reached the conclusion that the national provision was suitable to guarantee and promote the successful integration of TCNs in Denmark, and it shall be therefore addressed as a legal measure genuinely pursuing this goal. Indeed, integration capacity of minors is more likely to be boosted if they arrive in that Member State at an early age, so that they can attend school in the State concerned and acquire all essential skills for their successful integration.[61] Again, the objective of integration (the "overriding reason in public interest") is used by the Court as a compass to assess the legitimacy and suitability of measures such as language requirements.

Strengthening the rationale of the ruling under scrutiny, less than two months after the decision on the *X v Udlændingenævnet* case, the Court issued the decision delivered in *Staatssecretaris van Justitie en Veiligheid and Others*.[62] This case deals with a Dutch national law introduced in 2012, which made possible the revocation of residency permits of three Turkish nationals after living for more than 30 years in the Member State concerned. The TCNs were claimed to pose a threat to public policy because they had been convicted of several criminal offences. The ECJ acknowledged that the national legislation in question may restrict the right of free movement of Turkish nationals, compared to the situation before the entry into force of Decision No 1/80. Therefore, it constitutes a new restriction within the meaning of art. 13 of that Decision. However, the Court clarified that this new legislation may be justified under the standstill clause enshrined in art. 14 of the Decision as long as it is appropriate to ensure the achievement of the objective of protecting public order and does not go beyond what is necessary to achieve it. The ECJ affirmed that, in any case, measures justified on grounds of public policy or public security may be taken after a case-by-case evaluation by the competent national authorities, based on the prin-

[60] *K and A* cit. paras 58-59. See also M Jesse, 'Integration measures, integration exams and immigration control: P and S and K and A' cit. 182.

[61] *B v Udlændingenævnet* cit. para. 28.

[62] Case C-402/21 *Staatssecretaris van Justitie en Veiligheid and Others* ECLI:EU:C:2023:77.

ciple of proportionality and safeguarding the fundamental rights of the person in question.[63] This assessment is necessary to ascertain whether the "personal conduct of the person concerned constitutes a present, genuine and sufficiently serious threat to a fundamental interest of society".[64] Even though this case deals with a different situation compared to *X v Udlændingenævnet*, the reasoning and the guiding principles of the Court are the same: new restrictions may be introduced on the basis of a higher public interest and only after a proportionality test has been carried out.

VI. Conclusion

The Case *X. v Udlændingenævnet* builds on earlier ECJ case law related to the use of integration measures and conditions within the context of the Ankara Agreement and its standstill clauses, with some important innovations: *i)* the *indirect* nature of the pre-entry integration requirement under review; *ii)* the adoption of a national integration measure which relies on a *dependence-based* model of integration, and *iii)* the disproportional character of the measure considering the language test as the sole requirement for integration,[65] with a consequent failure to respect the principle of proportionality. Regarding the first "peculiarity", *X v Udlændingenævnet* deals with a national pre-entry requirement, even if an *indirect* one: the family member aiming at entering Denmark for the purpose of family reunification does not have to take any pre-departure test, while the latter is imposed on the Turkish worker already residing in Denmark, who failed to fulfil the necessary language requirement. Concerning the *dependence-based* model of integration, it assumes that the successful integration of the incoming family member completely depends on the family member already present in the Member State concerned, [66] who is required to pass a mandatory language test. Coming to the last issue, the ECJ acknowledged that the national measure goes beyond its legitimate aim, as Mr. Y's failure to pass the required language test automatically results in a refusal of his spouse's application for family reunification. The Danish legislation neither leaves room for other factors that may demonstrate the effective integration of the Turkish worker, nor provides for an individual assessment of the situation, in order to dispense Mr. Y from the integration test. Moreover, it does not set outs any "genuine derogation" from the integration domestic requirement than EU law in principle allows.[67] On this point, the documents before the Court seem to admit a derogation from this requirement only in case of *special reasons*

[63] *Ibid.* para. 72. In this sense, Case C-371/08 *Ziebell* EU:C:2011:809 para. 82.

[64] *Ibid.*

[65] K de Vries, 'Integration of Turkish nationals under the EEC-Turkey Association Agreement – an emerging concept without constitutional foundation' (1 February 2023) EU Law Live.

[66] *Ibid.*

[67] S Peers, 'Integration Requirements for family reunion: the CJEU limits Member States' discretion' (9 July 2015) EU Law Analysis.

related to Denmark's international obligations and "only if it is not possible to request the Turkish worker to pursue his or her family life in the country of origin without such invitation constituting an infringement of those obligations."[68]

All in all, the judgment consolidates the position of the Court, which considers the objective of successful integration an "overriding reason in the public interest" under the EEC-Turkey Association Agreement, accommodating in a way the willingness of certain Member States to impose language requirements on TCNs. However, the *conditio sine qua non* for the legitimacy of these measures under EU law is crystal-clear: they cannot be use as a *filter* for new incomers but must sustain TCNs in their integration path instead.[69] The Court takes upon itself the duty of determining case-by-case the legitimacy and suitability of national integration measures, *in absentia* of a precise definition of the concept of "integration" within the Ankara Agreement. EU secondary legislation is not much further ahead on this matter.[70] Even though the *migration directives* consider TCN integration as a key element in promoting economic and social cohesion,[71] these provisions do not specify the type of "integration" they are referring to, nor how to attain such integration.[72] Considering this uncertainty on the conception of integration at the legislative level, the ECJ "has [...] been drawn to formulate its own understanding of integration as a touchstone against which to measure Member States' actions."[73]

Notwithstanding the lack of a definition of integration in EU primary and secondary law, the Court has constantly clarified that in any case Member States must not handle this concept in a manner which is inconsistent with general principle of EU law,[74] *e.g.,* non-discrimination, proportionality and fundamental rights. By limiting national discretion to require TCNs – already present in the EU territory – to pass a mandatory integration test before joining their family members, the ECJ deplores Member States' deviation from the *effet utile* of integration clauses in EU secondary legislation, *i.e,* to promote TCN successful integration in the Union. [75] Therefore, the Court strengthens the legal boundaries set out by EU law to Member States' action in this field. TCN integration cannot in truth be conceived solely as a matter where the EU has limited competences finding their legal basis in art. 79(4) TFEU. It is also (and above all) an EU strategic policy, promoting openness and social cohesion within the broader framework of the Union's social pillars.

[68] *X v Udlœndingenœvnet,* opinion of AG Pitruzzella, cit. para. 39.

[69] *K and A* cit. para. 57.

[70] K de Vries, 'Integration of Turkish nationals under the EEC-Turkey Association Agreement – an emerging concept without constitutional foundation' cit.

[71] See *e.g.,* Whereas (4) of Directive 2003/86/EC and of Directive 2003/109/EC.

[72] See K de Vries, 'Integration of Turkish nationals under the EEC-Turkey Association Agreement – an emerging concept without constitutional foundation' cit.

[73] *Ibid.*

[74] Case C-540/03 *Parliament v. Council* ECLI:EU:C:2006:429, para. 70.

[75] D Vitiello, 'In Search of the Legal Boundaries of an "Open Society". The Case of Immigrant Integration in the EU' cit. 163.

This twofold angle does not rule out, yet requires the adoption of, "a more comprehensive understanding of integration, entrenching this Union's goal in all its policy action".[76] Thus, when dealing with TCN integration issues, the Union should not limit its action to what is *strictly necessary*, but encourage Member States to take TCN integration seriously[77] and play a more decisive role in defining what type of integration the EU, collectively and through the different Member States' policies, seeks to achieve. A stronger EU stance on this matter could contribute significantly to future cases such as the one analysed, reinforcing further the position of the Court in this regard.

[76] *Ibid.* 186.
[77] *Ibid.* 155.